Gerhard's Appliances, Inc. *and* Sean Brickley. Case 4–CA–37033

January 4, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the complaint. Upon a charge filed by Sean Brickley on September 3, 2009, the General Counsel issued the complaint and notice of hearing on October 21, 2009, alleging that the Respondent has violated Section 8(a)(3) and (1) of the Act. The Respondent failed to file an answer.

On November 17, 2009, the General Counsel filed a Motion for Default Judgment with the Board. On November 18, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. On November 24, 2009, the General Counsel filed an Amended Motion for Default Judgment with the Board.[1] The Respondent filed no response. The allegations in the motions are therefore undisputed.

Ruling on Motion for Default Judgment[2]

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively stated that the answer must be received on or before November 4, 2009. The complaint further stated that if no answer was filed, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true. Thereafter, by letter dated November 4, 2009, counsel for the General Counsel advised the Respondent that it had failed to file an answer to the complaint and that a motion for default judgment would be filed if an answer was not received by November 11, 2009. On November 5, 2009, a second letter was sent to the Respondent, again advising that its answer was overdue, and again notifying the Respondent that a motion for default judgment would be filed if an answer was not received by November 11, 2009. The Respondent failed to file an answer.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Amended Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Pennsylvania corporation with a warehouse in Fort Washington, Pennsylvania, and retail stores in Glenside, Doylestown, Frazer, and Ardmore, Pennsylvania, has been engaged in retail sale of kitchen appliances.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, received gross revenues in excess of $500,000 and purchased and received at its warehouse goods valued in excess of $500,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Teamsters, Local No. 830, the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Charles E. Gerhard III	—	President
Richard (Bud) Gerhard	—	President/Owner
Frank Morrow	—	Warehouse Manager

[1] The only material distinction between the Motion and the Amended Motion is that the latter attached as an exhibit the Postal Service Domestic Return Receipt showing that an agent of the Respondent received the complaint and notice of hearing on October 22, 2009.

[2] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Narricot Industries, L.P. v. NLRB*, ___ F.3d ___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___ S.Ct. ___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); *Teamsters Local 523 v. NLRB*, ___ F.3d ___, 2009 WL 4912300 (10th Cir. Dec. 22, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

The complaint alleges that the following conduct is unlawful:

1. In the week of July 27, 2009, the Respondent, by Richard Gerhard, at the warehouse, told an employee that the employee would be "done" if Gerhard heard anything else concerning the employee's union activities.

2. About the last week of July 2009, the Respondent ceased calling its employee Sean Brickley to work. The Respondent engaged in this conduct because Sean Brickley was engaging in union activities and in order to discourage employees from supporting the Union.

CONCLUSIONS OF LAW

1. By the conduct described above in paragraph 1, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

2. By the conduct described above in paragraph 2, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by ceasing to call Sean Brickley to work because of his union activities, we shall order the Respondent to offer him employment under the same conditions as previously prevailed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[3]

Finally, the Respondent shall also be required to remove from its files any and all references to its refusal to call Brickley to work, and to notify Brickley in writing that this has been done and that the Respondent's unlawful conduct will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Gerhard's Appliances, Inc., Fort Washington, Glenside, Doylestown, Frazer, and Ardmore, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they engage in union activities.

(b) Ceasing to call employees to work because they support or assist a labor organization or to discourage employees from engaging in union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Sean Brickley employment under the same conditions as previously prevailed.

(b) Make him whole for any loss of earnings and other benefits suffered as a result of its unlawful failure to call him to work, with interest, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to its refusal to call Brickley to work, and notify Brickley in writing that this has been done and that the unlawful conduct will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its warehouse in Fort Washington, Pennsylvania, and retail stores in Glenside, Doylestown, Frazer, and Ardmore, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be

[3] In the complaint, the General Counsel seeks an order requiring that the Respondent pay interest on any backpay or other monetary awards on a compounded, quarterly basis. The General Counsel does not further explain or provide argument in support of this request. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB 516, 516 fn. 1 (2008), citing *Rogers Corp*., 344 NLRB 504 (2005).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 27, 2009.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 4, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge if you engage in union activities.

WE WILL NOT cease to call you to work because you support or assist a labor organization or to discourage you from engaging in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Sean Brickley employment under the same conditions as previously prevailed.

WE WILL make him whole for any loss of earnings and other benefits suffered as a result of our unlawful failure to call him to work, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any and all references to our unlawful refusal to call Brickley to work, and WE WILL notify Brickley in writing that this has been done and that the unlawful conduct will not be used against him in any way.

GERHARD'S APPLIANCES, INC.